

SERVICE DATE — MARCH 24, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35981

FINCH PAPER LLC—PETITION FOR DECLARATORY ORDER

Digest:¹ This decision affirms the January 18, 2017 discovery order of an Administrative Law Judge at the Federal Energy Regulatory Commission after the Board requested clarification from the ALJ about an August 24, 2016 order that granted, in its entirety, a motion to compel discovery.

Decided: March 23, 2017

On September 13, 2016, Delaware and Hudson Railroad, d/b/a CP Rail (CP Rail), appealed an August 24, 2016 order issued by an Administrative Law Judge (ALJ) at the Federal Energy Regulatory Commission (FERC), which granted, in its entirety, a motion to compel discovery filed by Finch Paper LLC (Finch Paper). On January 11, 2017, the Board issued an order that clarified the Board's regulations with respect to interlocutory appeals of decisions by ALJs and remanded the matter to the FERC ALJ for additional explanation of his decision. On January 18, 2017, the ALJ issued an order clarifying his August 24, 2016 decision. On January 25, 2017, CP Rail appealed the January 18, 2017 decision. The Board denies CP Rail's appeal and affirms the ALJ's January 18, 2017 decision, for the reasons discussed below.

BACKGROUND

This is the second appeal of the same discovery dispute. The background of this discovery dispute is set forth fully in the Board's January 11, 2017 decision on CP Rail's first appeal of this discovery matter. See Finch Paper LLC—Pet. for Declaratory Order (Jan. 11, 2017 Decision), FD 35981 (STB served Jan. 11, 2017). As relevant here, on July 1, 2016, Finch Paper filed with the Board a motion to compel two sets of discovery requests served by Finch Paper on February 18, 2016, and April 11, 2016. CP filed its opposition to that motion on July 21, 2016.

On August 16, 2016, Finch Paper's motion to compel was referred to a FERC ALJ pursuant to the Memorandum of Understanding (MOU) between the FERC and the Board authorizing the referral of certain discovery matters pending before the Board to the FERC ALJs

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

for resolution. See Finch Paper LLC—Pet. for Declaratory Order, FD 35981, slip op. at 1 (STB served Aug. 16, 2016).

On August 24, 2016, the ALJ granted Finch Paper’s motion to compel in its entirety. The ALJ explained, in relevant part, that Finch Paper “may request from CP [Rail] any information or document(s) having any tendency to make any fact of consequence to the Board’s final determination in the proceeding more or less probable than it would be without the information or document(s).” See Finch Paper LLC—Pet. for Declaratory Order (Aug. 24, 2016 Decision), FD 35981, slip op. at 1 (STB served Aug. 24, 2016). The ALJ found that the Finch Paper requests met this standard. (See id.) CP Rail appealed that finding to the Board.

On January 11, 2017, the Board issued a remand on CP Rail’s appeal. See Finch Paper LLC—Pet. for Declaratory Order (Jan. 11, 2017 Decision), FD 35981 (STB served Jan. 11, 2017). The Board clarified the Board’s regulations and procedures for interlocutory appeals of decisions by ALJs (or by Board staff) on discovery. The Board then found that it could not “sufficiently discern the basis for the ALJ’s ruling based on the detail contained in the written decision.” Id. at 4-6. The Board therefore remanded the discovery matter to the ALJ for clarification of the ruling granting Finch Paper’s motion and denied the appeal as moot. Id. at 6.

On January 18, 2017, the ALJ issued a decision clarifying the Aug. 24, 2016 Decision. See Finch Paper LLC—Pet. for Declaratory Order (Jan. 18, 2017 Decision), FD 35981 (STB served Jan. 18, 2017). CP Rail appealed that decision pursuant to 49 C.F.R. §§ 1115.9(a) and 1115.1(c) on January 25, 2017. On January 30, 2017, Finch Paper replied in opposition to CP Rail’s appeal.

DISCUSSION AND CONCLUSIONS

A ruling by a FERC ALJ on a discovery issue is a preliminary decision that is reviewed as an interlocutory appeal. See Jan. 11, 2017 Decision, FD 35981, slip op. at 4-5. Under 49 C.F.R. § 1115.9(a), a Board employee’s ruling on discovery (including an ALJ’s ruling) may be appealed on an interlocutory basis only if it meets one of four enumerated circumstances: (1) the ruling denies or terminates any person’s participation; (2) the ruling grants a request for the inspection of documents not ordinarily available for public inspection; (3) the ruling overrules an objection based on privilege, the result of which is to require the presentation of testimony or documents; or (4) the ruling may result in substantial irreparable harm, substantial detriment to the public interest, or undue prejudice to a party. Jan. 11, 2017 Decision, FD 35981, slip op. at 5. Thus, § 1115.9(a) is a threshold determination that must be satisfied before the Board will analyze the merits of the appeal under the standard outlined in § 1115.1(c). That standard explains that an appeal “will be granted only in exceptional circumstances to correct a clear error in judgment or to prevent manifest injustice.” 49 C.F.R. § 1115.1(c).

CP Rail contends that it meets two of the § 1115.9(a) threshold criteria: first, that the ALJ’s ruling grants a request for the inspection of documents not ordinarily available for public

inspection under § 1115.9(a)(2); and, second, that the ruling may result in substantial irreparable harm or undue prejudice under § 1115.9(a)(4). (CP Rail Jan. 2017 Appeal 3.) CP Rail then addresses the § 1115.1(c) criteria by asserting that, in rejecting its relevancy and undue burden objections to Finch Paper's discovery requests, the ALJ committed a clear error of judgment that, if allowed to stand, would permit a manifest injustice. *Id.* More specifically, CP Rail argues that the ALJ's decision should be overturned because: (1) the ALJ fails to sufficiently explain why he denied CP Rail's relevancy objections concerning certain discovery requests (in particular, Finch Paper's requests seeking notices or enforcement actions by the FRA, Customer Audit Safety forms, and documents related to CP Rail's business strategies and plans); and (2) the ALJ failed to conduct the appropriate analysis concerning the alleged undue burden on CP Rail to compile the requested information. (*See id.* at 3-11.)

In its reply, at 6-10, Finch Paper contends that the ALJ correctly determined in the decision that the information sought is relevant. Specifically, Finch Paper explains that: the notices or enforcement actions by the FRA are relevant because they go to the ability of CP Rail to provide regular and adequate service to Finch, which in turn is relevant to whether the demurrage charges that CP Rail seeks to assess against Finch Paper are reasonable and appropriate (*Id.* at 6); that the Customer Audit Safety forms are relevant to whether CP Rail's reduction in service to Finch Paper constituted a violation of CP Rail's obligations as a common carrier (*Id.* at 7); and that requests seeking information related to CP Rail's business strategies and plans are relevant because there was a reduction in CP Rail's workforce in 2012 nationally and locally in the New York area where Finch Paper's mill is located, reducing the number of locomotives in use by CP Rail. (*Id.*) Finch Paper also argues that the ALJ did, in fact, address CP Rail's claim that producing this evidence would be unduly burdensome, noting that the ALJ ruled that CP Rail would not have to conduct any special studies (*Id.* at 5) and rejecting CP Rail's arguments concerning the volume of evidence being sought (*Id.* at 9). Finally, Finch Paper contends that CP Rail's appeal does not satisfy § 1115.9(a) because CP Rail has not shown that complying with its discovery obligations would impose irreparable harm or cause it undue prejudice. (*Id.* at 10-12.)

After reviewing the Jan. 18, 2017 Decision and considering the parties' arguments, the Board will deny CP Rail's appeal. As an initial matter, CP Rail has met the threshold criteria for an interlocutory appeal of the ALJ's decision under § 1115.9(a)(2), at least as to certain discovery requests. CP Rail is correct that, while some of the requested documents – such as FRA notices of violation – are publicly available, other requested documents – such as internal documents related to CP Rail's operational plans – are ordinarily not available for public inspection. Accordingly, CP Rail has satisfied one of the criteria for the Board to hear its interlocutory appeal. However, on the merits of its appeal, CP Rail has failed to show that the ALJ's decision contains a clear error of judgment or results in manifest injustice under § 1115.1(c).

To prevail under § 1115.1(c), CP Rail must meet the high burden of showing that the ALJ's rejection of CP Rail's relevancy objections constituted a clear error of judgment or would

result in manifest injustice. In ruling on discovery appeals, we have accorded the ALJ broad discretion to act within the scope of his or her authority. See CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc., FD 33388, slip op. at 3 & 5 (STB served Feb. 23, 1998). Thus, CP Rail must do more than show that the ALJ could have reached a different outcome regarding the requested discovery.

In its attempt to meet the clear error/manifest injustice standard, CP Rail makes two overarching arguments. First, it argues that the ALJ's decision did not sufficiently explain why its relevancy objections were rejected. However, while the ALJ did not specifically address the potential relevancy of the documents sought by each discovery request, he did explain that CP Rail's relevancy objections "were primarily directed to the *scope* of the information requested rather than its potential to make any fact of consequence to the Board's final determination in the proceeding more or less probable than it would be without the information." Jan. 18, 2017 Decision, slip op. at 3 n.5. CP Rail's argument that documents about the FRA enforcement action, the Customer Safety Audit forms, and CP's internal allocation of resources and personnel are not relevant under CP Rail's theory of the case² ignores the fact that they could be relevant under Finch's approach to the case. CP Rail may not agree with the ALJ's explanation, but just disagreeing with the ALJ's explanation does not meet the standard for reviewing a denial of discovery. We find no clear error of judgment or manifest injustice in the ALJ's determination on CP Rail's relevancy objections.

Second, CP Rail asserts that the ALJ's ruling constituted a clear error of judgment or manifest injustice because it failed to assess the undue burdens associated with complying with Finch Paper's discovery requests. But the ALJ did address CP Rail's argument. CP Rail argued to the ALJ that because CP Rail had already turned over substantial volumes of information, the burdens of producing the additional information outweighed its value. However, the ALJ found, slip op. at 3, that this argument: (1) conflated volume with probative value; (2) completely failed to address probative value; and (3) substituted CP Rail's opinion for a Board determination with respect to how much information would be sufficient in this case. CP Rail, while disagreeing with his explanation, has not demonstrated why the ALJ's resolution was so egregious as to amount to a clear error of judgment or manifest injustice.

Based upon review of the ALJ's Jan. 18, 2017 Decision, the Board finds that CP Rail has not satisfied the requirement of showing a clear error of judgment or manifest injustice, and its appeal will be denied.

² CP Rail has also suggested that certain requested safety audit materials may contain information about CP Rail's other rail customers' facilities that those customers might consider to be competitively sensitive. See Jan. 18, 2017 Decision, slip op. at 2 n.2. But the ALJ determined that CP Rail provided no support for this assertion, and we find no clear error or manifest injustice in the ALJ's determination on this issue. And even if the information is competitively sensitive, a protective order is in place to prevent dissemination of highly confidential information to anyone other than outside counsel and consultants. See Finch Paper—Pet. For Declaratory Order, Docket No. FD 35981 (STB served May 10, 2016).

Finch Paper and CP Rail are ordered to file, by March 31, 2017, a joint motion to amend the procedural schedule to allow for completion of discovery, supplementing the Opening and Reply filings, as necessary, and filing rebuttal evidence.

It is ordered:

1. CP Rail's appeal is denied.
2. Finch Paper and CP Rail are ordered to file a joint motion to amend the procedural schedule by March 31, 2017.
3. This decision is effective on its service date.

By the Board, Board Members Begeman, Elliott and Miller.